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No. 95-591

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 4371 of the Internal Revenue Code, 26 U.S.C. 4371, imposes a tax of four cents per dollar on casualty insurance premiums paid to a foreign insurer for the risks of a domestic insured that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)). The question presented in this case is:

Whether, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad, the tax imposed by Section 4371 of the Internal Revenue Code violates the Export Clause of the Constitution of the United States (U.S. Const. Art. I, § 9, Cl. 5).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 59 F.3d 1234. The opinion of the Court of Federal Claims (Pet. App. 12a-30a) is reported at 31 Fed. Cl. 500.

JURISDICTION

The judgment of the court of appeals (Pet. App. 31a) was entered on July 10, 1995. The petition for a writ of certiorari was filed on October 10, 1995 (a Tuesday following a Monday holiday), and was granted on December 8, 1995. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitution of the United States provides, in relevant part:

a. Art. I, § 8, Cl. 3:

> The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

b. Art. I, § 9, Cl. 5:

> No Tax or Duty shall be laid on Articles exported from any State.

c. Art. I, § 10, Cl. 2:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws * * *.

2. The Internal Revenue Code provides, in relevant part:

a. 26 U.S.C. 4371:

> There is hereby imposed, on each policy of insurance, indemnity bond, annuity contract, or policy of reinsurance issued by any foreign insurer or reinsurer, a tax at the following rates:
>
> (1) 4 cents on each dollar, or fractional part thereof, of the premium paid on the policy of casualty insurance or the indemnity bond, if issued to or for, or in the name of, an insured as defined in section 4372(d);
>
> (2) 1 cent on each dollar, or fractional part thereof, of the premium paid on the policy of life, sickness, or accident insurance, or annuity contract, unless the insurer is subject to tax under section 819, and
>
> (3) 1 cent on each dollar, or fractional part thereof, of the premium paid on the policy of reinsurance covering any of the contracts taxable under paragraph (1) or (2).

b. 26 U.S.C. 4372:

> (a) For purposes of section 4371, the term "foreign insurer or reinsurer" means an insurer or reinsurer who is a nonresident alien individual, or a foreign partnership, or a foreign corporation. * * *
>
> (b) For purposes of section 4371(1), the term "policy of casualty insurance" means any policy (other than life) or other instrument by whatever name called, whereby a contract of insurance is made, continued, or renewed.
>
> * * * * *
>
> (d) For purposes of section 4371(1), the term "insured" means—(1) a domestic

corporation or partnership, or an individual resident of the United States, against, or with respect to, hazards, risks, losses, or liabilities wholly or partly within the United States, * * *.

* * * * *

c. 26 U.S.C. 4373 (1982):[1]

The tax imposed by section 4371 shall not apply to—

(1) any policy, indemnity bond, or annuity contract signed or countersigned by an officer or agent of the insurer in a State, or in the District of Columbia, within which such insurer is authorized to do business; * * *

* * * * *

d. 26 U.S.C. 4374:

The tax imposed by this chapter shall be paid, on the basis of a return, by any person who makes, signs, issues, or sells any of the documents and instruments subject to the tax, or for whose use or benefit the same are made, signed, issued or sold. * * *

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[1] This provision was amended in 1988 to conform to terminology elsewhere employed by Congress to describe activities that are "effectively connected" to activities within the United States and are therefore subject to the federal income tax. See 26 U.S.C. 864(c), 882(a)(1). The amendment does not alter the application of the statute in the context of this case.

STATEMENT

1. Respondent International Business Machines Corporation brought this suit in the Court of Federal Claims to obtain a refund of $1.5 million in taxes assessed under Section 4371 of the Internal Revenue Code. IBM does not dispute that the taxes were correctly assessed under the statute. Instead, IBM contends that the statute is unconstitutional as applied to the facts of this case.

a. Section 4371 of the Internal Revenue Code, 26 U.S.C. 4371, imposes a tax of four cents per dollar on casualty insurance premiums paid to a foreign insurer for the risks of a domestic insured that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)).[2] The tax is to be paid by "any person * * * for whose use or benefit" the policy is "made, signed, issued, or sold." 26 U.S.C. 4374.

Section 4371 was enacted in 1942 to "eliminate an unwarranted competitive advantage now favoring foreign insurers" who are not subject to the federal income tax. H.R. Rep. No. 2333, 77th Cong., 2d Sess. 61 (1942). The tax therefore does not apply if the policy issued by the foreign insurer is "signed or countersigned by an officer or agent of the insurer in a State, or in the District of Columbia, within which such insurer is authorized to do business." 26 U.S.C. 4373(1) (1982). See also note 1, *supra*; 26 C.F.R. 46.4371-2(a).

b. IBM manufactures a variety of business products that it sells throughout the world. During the

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[2] The term "foreign insurer" is defined to mean an insurer "who is a nonresident alien individual, or a foreign partnership, or a foreign corporation" (26 U.S.C. 4372(a)).

period involved in this case, IBM shipped products for international sales from its manufacturing facilities or warehouses in Arizona, California, Colorado, Florida, Minnesota, New York, North Carolina, Texas, and Virginia (Pet. App. 13a-14a). IBM made its international sales through a network of more than one hundred wholly owned subsidiaries (Pet. App. 14a-15a):

> Sales outside the United States of IBM products manufactured within the United States were accomplished by a purchase order to IBM from its foreign subsidiary, under which IBM billed the subsidiary and generally shipped the goods directly to the subsidiary's customer. Lower priced goods might be shipped to a consolidation center in the foreign country, and maintained as inventory by the foreign subsidiary to fill future orders. * * *

Shipment of products from the United States to the foreign customer began by truck on a common carrier (from the manufacturing plant or warehouse). The goods generally were destined for a United States airport (typically John F. Kennedy in New York for shipments to Europe and the Middle East, Miami International for shipments to Latin America, and San Francisco International for shipments to the Far East), but some shipments were by sea. While traveling within the United States, the products would typically be unloaded at one or more intermediate freight forwarder locations, where they would typically remain for two to five days, but could remain * * * as long as thirty days. The products would be reloaded at the freight for-

> warders' facilities and continue ultimately to the point of embarkation, where they were loaded onto an airplane or a ship. Once the products reached the air or sea port in the foreign country, they were unloaded, cleared customs, and loaded on trucks for shipment to their final destination.

The terms of sale specified that title to the goods, and risk of loss, passed from IBM to its foreign subsidiary only when the goods cleared customs in the foreign country. The foreign subsidiaries were nonetheless required to bear the cost of insuring the products against damage or loss during the entire shipment (Pet. App. 15a).

The insurance obtained for these shipments was "point to point": it covered the risk of damage or loss during transportation of the goods from the IBM facility in the United States to the point of foreign delivery. When IBM made the arrangements, the insurance was placed with a domestic insurer and the cost was billed to the foreign subsidiary. When the foreign subsidiary made the arrangements, the insurance was often placed with a foreign carrier, which the subsidiary paid directly. In both situations, IBM and its foreign subsidiary were listed as joint beneficiaries on the policies of insurance (Pet. App. 15a-16a).

If damage or loss occurred before the goods cleared customs —while IBM retained title to the goods and risk of loss—IBM received the insurance proceeds directly under these policies. If the loss occurred *after* the goods cleared customs—when title and risk of loss had passed to the importing foreign subsidiary —the insurance proceeds were paid to the subsidiary. In the latter event, the proceeds were used by the -

subsidiary to pay the full purchase price of the damaged or lost goods to IBM or, if IBM had already been paid, to reimburse the subsidiary for its loss (Pet. App. 16a).

c. IBM filed federal excise tax returns for 1975 through 1984 but did not report any liability under Section 4371 of the Internal Revenue Code. On audit, the Internal Revenue Service determined that the premiums paid to foreign insurers were subject to the tax imposed by Section 4371 and that, pursuant to Section 4374, IBM was liable for the tax as a named beneficiary of the insurance policies.

The foreign subsidiaries reported to IBM that, during 1980, they had paid premiums of $2,065,137 to foreign insurers for "point to point" insurance covering shipments of products that IBM had manufactured in the United States. The tax applicable to those premiums under Section 4371(1) of the Code—calculated by multiplying the premiums by four percent—is $82,605. The parties stipulated that the foreign insurance premiums attributable to shipments of IBM products in each of the years 1975-1979 and 1981-1984 were the same as in 1980. The IRS therefore assessed the same amount of tax for each of those years under Section 4371 (Pet. App. 18a).

2. IBM paid the resulting assessments and filed claims for refund. When those claims were denied, IBM commenced this refund suit in the Court of Federal Claims. The relevant facts were stipulated by the parties (Pet. App. 34a-41a).

a. IBM contended that the tax imposed by Section 4371 of the Internal Revenue Code—as applied to insurance premiums on policies covering the shipment of goods from locations within the United States to purchasers abroad—violates the Export

Clause of the Constitution, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5. IBM contended that the tax on insurance for export shipments is a "Tax or Duty * * * laid on Articles exported" and is invalid under the specific holding of this Court in *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915). In *Thames & Mersey*, the Court held a federal stamp tax on policies insuring marine risks unconstitutional as applied to policies covering shipments for export.

The United States contended that the analysis of *Thames & Mersey* is no longer valid. The government reasoned that subsequent decisions of this Court, such as *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1978), and *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), require the conclusion that the Export Clause does not invalidate a generally applicable, nondiscriminatory tax that does not fall specifically on articles of export or export transactions.

b. The Court of Federal Claims held that application of the tax imposed by Section 4371 to insurance premiums for goods in export transit violates the Export Clause because it "amounts to a tax on exports" (Pet. App. 26a). The court reasoned that this conclusion follows from the precise holding of this Court's 1915 decision in *Thames & Mersey*, which stated (237 U.S. at 26):

> It cannot be doubted that insurance during the voyage is by virtue of the demands of commerce an integral part of the exportation.

The Court of Federal Claims emphasized that, under *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), lower courts "must adhere to the accepted practice of following Supreme Court precedent unless the Supreme Court clearly states that it is overruling earlier cases and explains why it is doing so" (Pet. App. 28a). The court found no clear evidence that *Thames & Mersey* had been overruled or that its analysis has been discarded by this Court. The court held that *Thames & Mersey* therefore remains authoritative and that it compels the conclusion that the tax imposed by Section 4371 is unconstitutional as applied in this case (Pet. App. 29a).

The court acknowledged that this Court's more recent decisions under the Import-Export Clause in *Michelin Tire* and *Washington Stevedoring* have upheld application of nondiscriminatory state taxes to goods and services involved in importation and exportation. The court concluded, however, that those decisions could be distinguished on their facts. The court explained that *Washington Stevedoring*—which upheld application of a state gross receipts tax to a stevedoring company that handled export and import shipments—concerned "stevedoring" rather than "insurance" and that "stevedoring is a service whose value is not necessarily tied to the value of the goods it serves" (Pet. App. 29a). The court further stated that *Michelin Tire*—which upheld application of a state property tax to imported goods located within the borders of the State—is inapposite because "in *Michelin* the [imported goods] had left the import stream and were * * * thus outside the scope of the Import-Export Clause" (Pet. App. 29a).

3. The court of appeals affirmed (Pet. App. 1a-11a). The court noted (*id.* at 11a) that this Court has admonished the lower courts that (*Rodriguez de Quijas* v. *Shearson/American Express Co.*, 490 U.S. at 484)

> [i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

The court of appeals stated that it was therefore bound to follow *Thames & Mersey*, and hold the tax imposed by Section 4371 unconstitutional as applied in this case, unless subsequent decisions of this Court "clearly signaled" an intent to overrule that earlier decision (Pet. App. 8a).

The court of appeals concluded that it was "not so sure" (Pet. App. 8a) that *Washington Stevedoring* and *Michelin Tire* signaled the requisite clear intent of this Court to abandon the analysis of *Thames & Mersey*. The court of appeals did not dispute that, if an analysis "similar" to that applied under the Import-Export Clause in *Michelin Tire* and *Washington Stevedoring* were applied under the Export Clause, the holding and reasoning of *Thames & Mersey* would be discredited (Pet. App. 7a-8a). Instead, the court stated that it was not certain that a similar analysis would be applied because there is a difference in the language of the two Clauses that could require a different result: the Import-Export Clause bars States from laying "Imposts or Duties on Imports or Exports"; the Export Clause bars the United States from laying any "Tax or Duty * * *

on Articles exported from any State." The court of appeals stated (*id.* at 9a-10a):

> Although the [Supreme] Court at first expressed the view that the "diversity in language" between the two clauses did not reflect any difference in "the act which is prohibited," *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 425 (1827), in both *Michelin* and *Washington Stevedoring* the Court has noted and attached significance to the difference between the narrow term "Imposts and Duties" * * * and the broader term "Tax" * * * . *See Michelin*, 423 U.S. at 290; *Washington Stevedoring*, 435 U.S. at 759.

Reasoning that a "tax" that might be permitted under the "narrow" language of the Import-Export Clause might nonetheless be invalid under the "broader" language of the Export Clause (Pet. App. 10a), the court concluded that the recent Import-Export Clause decisions fail to provide the requisite clear guidance that would permit a lower court to "disregard[] a higher court decision that all agree is binding precedent if it is still valid" (*id.* at 10a-11a).[3] The court therefore held "that [its] duty is to follow *Thames & Mersey* and hold Section 4371 invalid as applied" (*id.* at 11a).

SUMMARY OF ARGUMENT

The federal tax on insurance premiums paid to a foreign insurer for risks that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)) is a nondiscriminatory tax of general application. It does

[3] The court of appeals noted that the United States had conceded that, "if *Thames & Mersey* is still good law, the assessments at issue in this case are invalid" (Pet. App. 6a).

not apply specifically to export transactions; to the contrary, it applies only to insurance risks that are either "wholly" or "partly" domestic. The tax was enacted to diminish the competitive advantage that existed for foreign insurers who were otherwise not subject to the federal income tax.

The court of appeals erred in concluding that application of this tax to casualty insurance for shipments from within the United States to foreign countries violates the Export Clause of the Constitution. In particular, the court erred in relying on this Court's 1915 decision in *Thames & Mersey Marine Ins. Co.* v. *United States* for this conclusion. This Court's more recent decisions have repudiated the reasoning of *Thames & Mersey*. Under the analysis of these modern decisions, the tax imposed by Section 4371 does not violate the Export Clause because it is a generally applicable, nondiscriminatory tax that does not fall specifically on articles of export or export transactions. As this Court stated in upholding a similarly nondiscriminatory federal tax against an Export Clause challenge in *Peck & Co.* v. *Lowe*, 247 U.S. 165, 175 (1918): "There is no discrimination. At most, exportation is affected only indirectly and remotely."

As this Court has noted, the Export Clause "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated." *Cornell* v. *Coyne*, 192 U.S. 418, 427 (1904). The history of the Export Clause reflects that it was designed to protect the exports of individual States from repressive discrimination by other States acting through their representatives in the National government. That nondiscrimination policy does not require that exports be relieved "from

uniform taxes" applicable to all commerce generally or that Congress give "preferential treatment" to exports by exempting them from generally applicable taxes (*Michelin Tire Corp.* v. *Wages*, 423 U.S. at 293-294). The nondiscriminatory, generally applicable tax imposed by Section 4371 is therefore constitutional and should be upheld.

ARGUMENT

SECTION 4371 OF THE INTERNAL REVENUE CODE IMPOSES A GENERALLY APPLICABLE, NONDISCRIMINATORY TAX THAT DOES NOT FALL SPECIFICALLY UPON ARTICLES OF EXPORT OR EXPORT TRANSACTIONS AND DOES NOT VIOLATE THE EXPORT CLAUSE OF THE CONSTITUTION

The court of appeals concluded that the federal tax on insurance premiums paid to a foreign insurer for risks that are "wholly or partly within the United States" (26 U.S.C. 4372(d)(1))—as applied to casualty insurance for shipments from the United States to foreign countries—represents a "Tax or Duty * * * laid on Articles exported" (U.S. Const. Art. I, § 9, Cl. 5) and therefore violates the Export Clause of the Constitution. The court stated that it was compelled to follow this Court's 1915 decision in *Thames & Mersey Marine Ins. Co.* v. *United States* in reaching that conclusion.

This Court's more recent decisions, however, have repudiated the reasoning of *Thames & Mersey*. Under the analysis of these modern decisions, the tax imposed by Section 4371 does not violate the Export Clause because it is a generally applicable, nondiscriminatory tax that does not fall specifically on articles of export or export transactions.[4]

1. *The Tax Imposed By Section 4371 Is A Generally Applicable, Nondiscriminatory Tax.* The tax imposed by Section 4371 of the Internal Revenue Code is not specifically directed to nor directly "laid on Articles exported" (U.S. Const. Art. I, § 9, Cl. 5). Instead, it applies to insurance premiums paid to foreign insurers for many forms of insurance, including any casualty risk that is "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)). It thus applies without discrimination to "wholly" domestic transactions as well as to risks that are only "partly" within the United States. As the House Ways and Means Committee observed when the statute was first enacted in 1942, Section 4371 is

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[4] The proper scope of the Export Clause has significance not only for the tax imposed under Section 4371 but also for other nondiscriminatory federal taxes of general application. For example, Section 4461 of the Internal Revenue Code imposes on all shippers a "tax on any port use" of 0.125 percent of the value of all commercial cargo loaded or unloaded in United States ports. See 26 U.S.C. 4461(a), (b) (Supp. V 1993), 4462(a)(1). In cases brought by over 700 shippers involving more than $500,000,000 in revenues that have already been collected, the United States Court of International Trade recently held Section 4461 to be unconstitutional as applied to transactions involving goods for export. *United States Shoe Corp.* v. *United States*, Slip op. 95-173, at 8, 23 (Oct. 25, 1995). In determining that such a generally applicable, nondiscriminatory tax would violate the Export Clause, the Court of International Trade cited as authoritative, and applied the reasoning of, the decision of the Federal Circuit in this case (*id.* at 17-24). The Federal Circuit has exclusive jurisdiction over appeals from decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5).

designed to "eliminate an unwarranted competitive advantage now favoring foreign insurers" who are not subject to the federal income tax. H.R. Rep. No. 2333, *supra*, at 61.

It is unquestioned that the tax imposed under Section 4371 could and would be applied to a policy of casualty insurance issued by a foreign insurer covering risks that are "wholly" within the United States—for example, insurance for the transit of goods from Minnesota to Hawaii. As long ago as *Woodruff* v. *Parham*, 75 U.S. (8 Wall.) 123 (1869), it was established that goods moving from one State to another are not "exports" from the shipping State or "imports" in the receiving State within the meaning of the Constitution. The question addressed in this case is thus limited to whether the tax imposed by Section 4371 on premiums for casualty insurance for shipments "partly" outside of the United States is unconstitutional even though application of that tax to shipments "wholly" within the United States is unquestionably valid.

2. *The Export And Import-Export Clauses Are Complementary In Scope.* The proper resolution of this narrow question requires consideration of the text and history of, and the rulings of this Court under, both the Export Clause and the Import-Export Clause. The court of appeals suggested, however, that the language of the Export Clause may be "broader" in its prohibitive scope than the language of the Import-Export Clause (Pet. App. 10a) and that decisions under the latter Clause therefore may not be relevant in interpretation of the former.

That suggestion, however, does not withstand analysis. The entire text of the two Clauses must be considered. The Import-Export Clause precludes

States from imposing "Imposts or Duties on Imports or Exports"; the Export Clause specifies that no federal "Tax or Duty shall be laid on Articles exported." U.S. Const. Art. I, § 10, Cl. 2; Art. I, § 9, Cl. 5. An "impost" or "duty" on an "export" *is* a "tax" on an "Article exported"; a "tax" on an "Article exported" *is* an "impost" or "duty."[5] Giving effect to the *entire* text of both Clauses, Chief Justice Marshall stated in this Court's first decision under either the Import-Export Clause or the Export Clause (*Brown* v. *Maryland*, 25 U.S. (12 Wheat.) at 445):

> The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited.

That observation has been repeated by this Court on numerous occasions.[6] In the more numerous cases under the Import-Export Clause and the less numerous cases under the Export Clause, the Court has routinely cited cases under the two Clauses without differentiation. Moreover, as we shall discuss, the analysis applied in opinions under the two Clauses has not varied.

3. *The "Original Package" Doctrine and Early Decisions Addressing Generally Applicable, Non-*

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[5] In *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 437 (1827), Chief Justice Marshall explained that an "impost" is a "duty on imports" and represents "a tax levied on articles brought into a country * * *."

[6] See, *e.g.*, *Turpin* v. *Burgess*, 117 U.S. 504, 506-507 (1886); *Cornell* v. *Coyne*, 192 U.S. 418, 427 (1904); *United States* v. *Hvoslef*, 237 U.S. 1, 14 (1915); *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62, 67 n.5 (1974).

discriminatory Taxes Under the Import-Export Clause. In *Brown* v. *Maryland*, a Maryland statute required that importers or wholesalers of foreign goods purchase a license costing $50 before selling such goods. Brown was convicted of having imported and sold a package of foreign goods without having obtained the license. In holding that the statute violated the Import-Export Clause, the Court explained that a tax on the privilege of selling foreign goods was, in substance, a duty upon things imported for sale. 25 U.S. (12 Wheat.) at 439. Rejecting the suggestion that this would mean that imported goods would be permanently immune from taxation by the States, the Court stated that an import retained its "distinctive character" only while in the "original form or package in which it was imported" (*id.* at 442).

The statute involved in *Brown* v. *Maryland* discriminated against imported goods because it imposed no comparable licensing requirement for the sale of domestic goods. See 25 U.S. (12 Wheat.) at 436. In the *License Cases*, 46 U.S. (5 How.) 504 (1847), the Court upheld a similar licensing requirement that applied to the sales of *both* imported and domestic goods. Chief Justice Taney, who had argued the case of *Brown* v. *Maryland* for the State, did not question the validity of the "original package" doctrine and acknowledged that a tax directed uniquely at imports would be invalid. *Id.* at 574-575. He explained, however, that a generally applicable, nondiscriminatory state tax would not be unconstitutional merely because the tax also applies to imported goods (*id.* at 576):

> Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable accordingly to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is owner. But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State.

Twenty-five years after the *License Cases*, however, the Court reached a different conclusion in *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872). In *Low*, the Court held that a nondiscriminatory, generally applicable California property tax could *not* be imposed upon a shipment of French champagne held in an importer's warehouse in the "original package" in which shipped. *Id.* at 35. In so ruling, the Court neglected to consider the contrary conclusion of Chief Justice Taney in the *License Cases*, although his approval of the "original package" doctrine was cited by the Court. *Id.* at 33-34.[7]

4. *The Early Export Clause Cases.* The Export Clause was invoked in *Pace* v. *Burgess*, 92 U.S. 372 (1876), by a tobacco manufacturer who, in 1868, was subject to a federal excise tax on tobacco products. Although tobacco intended for export was exempt from the tax, the exemption was subject to the

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[7] The "original package" rule was also followed in *Cook* v. *Pennsylvania*, 97 U.S. 566 (1878), *Anglo-Chilean Nitrate Sales Corp.* v. *Alabama*, 288 U.S. 218 (1933), and *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945). See also *May* v. *New Orleans*, 178 U.S. 496 (1900); *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U.S. 534 (1959).

requirement that packages for export be identified by an engraved stamp costing 25 cents. The manufacturer brought suit to recover the price of the stamps, claiming that they constituted a prohibited tax on exports. The Court denied recovery, explaining that the stamps were designed to prevent fraud and did not represent a tax. *Id.* at 375.

In 1882, however, Congress discontinued the charge for the exemption stamp in a statute that referred to the stamp as an "export tax." Act of Aug. 8, 1882, ch. 468, 22 Stat. 372. On that basis, another tobacco manufacturer sued to recover the amounts he had paid for these stamps before the charge was discontinued. The Court adhered to its decision in *Pace* v. *Burgess*, but with a somewhat different rationale. In describing the Export and Import-Export Clauses, the Court stated (*Turpin* v. *Burgess*, 117 U.S. 504, 507 (1886) (emphasis added)):

> The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. * * * But *a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of this intended exportation, is not within the constitutional prohibition.*

Quoting and relying upon the above passage, the Court subsequently held in *Cornell* v. *Coyne*, 192 U.S. 418, 427-428 (1904), that a manufacturer who produced filled cheese under a contract for export sale could not—merely because the cheese was designated for export—escape liability for the federal tax of one cent per pound on that product. The Court explained that the Export Clause "does not mean that articles

exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated" (*id.* at 427).

5. *The Decisions Leading to Thames & Mersey.* The direct predecessor of *Thames & Mersey* was *Fairbank* v. *United States*, 181 U.S. 283 (1901). That case involved a provision of the War Revenue Act of 1898 that imposed a variety of stamp taxes on written instruments, including "[b]ills of lading * * * for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place" (ch. 448, § 25 (Schedule A), 30 Stat. 459). In *Fairbank*, the Court held that this stamp tax on bills of lading, which applied *only* to exported goods, violated the Export Clause. Invoking a prior, similar holding under the Import-Export Clause (*Almy* v. *California*, 65 U.S. (24 How.) 169 (1861)), the Court held that the tax upon a bill of lading was invalid because it was equivalent to a tax upon the exported goods themselves.

Two later cases, argued on the same day, are the cases upon which respondent relies. Like *Fairbank*, they involved stamp taxes imposed by the War Revenue Act of 1898. Unlike *Fairbank*, however, neither tax was imposed expressly or uniquely on export transactions. *United States* v. *Hvoslef*, 237 U.S. 1 (1915), involved a federal stamp tax upon any "Contract or agreement for the charter of any ship" without reference to the intended destination of the ship or its cargo (30 Stat. 460). *Thames & Mersey Marine Ins. Co.* v. *United States*, 237 U.S. 19 (1915), upon which respondent most directly relies, involved a federal stamp tax on policies of marine insurance "whether covering peril by sea or on inland waters" (§ 25, 30 Stat. 461). Since these statutory provisions

did not differentiate between domestic voyages and shipments to foreign ports, it might have been supposed that they would be sustained as nondiscriminatory taxes of general applicability under the reasoning of the 1886 decision in *Turpin* v. *Burgess* and the 1904 decision in *Cornell* v. *Coyne*. See pages 20-21, *supra*.

In *Hvoself*, however, the Court invoked its decision in *Fairbank* without acknowledging that the stamp tax challenged in *Hvoslef*—unlike the tax challenged in *Fairbank* — was of general applicability and was not limited to voyages involving exports. In support of its conclusion in *Hvoslef* that a tax of general applicability would violate the Export Clause if it applied to export trade, the Court invoked *Robbins* v. *Shelby County Taxing District*, 120 U.S. 489 (1887). *Robbins* was the first of "a long line of 'drummer' cases" in which the Court held, under the Commerce Clause, that a State could not impose a licensing fee on a person who solicited orders for goods to be shipped from another State.[8] The Court stated in *Robbins* (*id.* at 497):

[8] See *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389, 392 (1952). *Robbins* had a numerous progeny. See, *e.g.*, *Crutcher* v. *Kentucky*, 141 U.S. 47 (1891); *DiSanto* v. *Pennsylvania*, 273 U.S. 34 (1927); *Nippert* v. *Richmond*, 327 U.S. 416 (1946). Among the more recent was *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), which this Court overruled in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). In *Complete Auto Transit, Inc.*, the Court held, contrary to *Robbins* and *Spector*, that generally applicable state licensing statutes could be applied according to their terms, without granting exemption to those whose business was solely interstate. See 430 U.S. at 279-289; pages 29-30, *infra*.

These decisions concerning the negative implications of the Commerce Clause are not logically relevant to analysis under the Export Clause. Although the Commerce Clause operates as a limitation on the powers of the States, it *confers* powers on the United States. See page 36, *supra*.

> It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate Commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state.

Having applied *Fairbank* and *Robbins* to exempt export transactions from broadly applicable, nondiscriminatory taxing provisions in *Hvoslef*, the Court entered its decision in *Thames & Mersey* two weeks later on the authority of *Hvoslef*. 237 U.S. at 27. In neither *Hvoslef* nor *Thames & Mersey* did the Court discuss the reasoning of prior decisions (such as *Cornell* v. *Coyne*, *supra*) that had upheld application of nondiscriminatory taxes that apply generally "to all property alike" and are not levied upon or because of the "exportation" or "intended exportation" of the goods (*Turpin* v. *Burgess*, 117 U.S. at 507).

The decisions in *Hvoslef* and *Thames & Mersey* established a pattern that this Court subsequently followed of immunizing export transactions from generally applicable federal taxes. For example, when Congress imposed a general tax on various sporting goods under the War Revenue Act of 1917, ch. 63, 40 Stat. 300, 317, the Court invoked not *Cornell* v. *Coyne* but *Hvoslef* and *Thames & Mersey* to hold that the Export Clause prohibited imposition of that tax upon a shipment of baseballs and bats to a purchaser in

Venezuela. *A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66 (1923). See also *Crew Levick Co.* v. *Pennsylvania*, 245 U.S. 292 (1917) (same under the Import-Export Clause). Similarly, in *Puget Sound Stevedoring Co.* v. *State Tax Commission*, 302 U.S. 90 (1937), and *Joseph* v. *Carter & Weekes*, 330 U.S. 422 (1947), the Court held that state sales or gross receipts taxes could not be imposed upon payments for loading and unloading ship cargoes transported in interstate or foreign commerce.

6. *The Modern Decisions Upholding Application of General, Nondiscriminatory Taxes to Export Transactions.*

a. Three years after the Court's decisions in *Hvoslef* and *Thames & Mersey*, the Court returned to an interpretation of the Export Clause that focussed on whether the challenged tax applied without discrimination to both domestic and foreign transactions. In *Peck & Co.* v. *Lowe*, 247 U.S. 165 (1918), the Court rejected the contention that the Export Clause precludes the United States from taxing the income that a taxpayer derives from export transactions. In *Peck & Co.*, more than two thirds of the taxpayer's income had been derived from export sales. *Id.* at 172. The taxpayer paid the federal income tax on its entire income and brought suit to recover the part of the tax paid on the income from export sales.

In a relatively brief opinion by Justice Van Devanter, the Court denied recovery. The decision is often stated to rest upon the fact that the tax was upon net, rather than gross, income. See L. Tribe,

American Constitutional Law § 6-19, at 463 n.18 (2d ed. 1988).[9] Indeed, the opinion states (247 U.S. at 175):

> At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins.

But the Court did not rest its decision in *Peck & Co.* wholly upon that explanation. Instead, the Court further stated (247 U.S. at 174-175 (emphasis added)):

> The tax in question is unlike any of those heretofore condemned. * * * On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (*see Stanton* v. *Baltic Mining Co.*, *supra*, pp. 113), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are "net income arising or occurring from all sources". *There is no discrimination. At most, exportation is affected only indirectly and remotely.*

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[9] That explanation, however, suggests as many questions as it purports to answer. What if the income tax were imposed only on net income from export sales? Or what if net income from export sales were taxed at a rate higher than net income from domestic transactions? Would either such "net" income tax survive a challenge under the Export Clause?

The fact that the federal income tax is a "general tax" that applies to all sources of income without "discrimination" is the more persuasive basis for the Court's decision in *Peck & Co.* That reasoning is a more complete explanation of the Court's conclusion (see note 9, *supra*) and it builds directly upon the analysis applied by the Court in *Turpin* v. *Burgess* and *Cornell* v. *Coyne*. That reasoning also anticipates the recent decisions of this Court under the Import-Export and Commerce Clauses.

b. During the following decades, there were further indications that the Court was reconsidering whether the Constitution immunizes interstate and foreign transactions from generally applicable, nondiscriminatory taxes. For example, in *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938), in upholding application of a nondiscriminatory, generally applicable state tax to a taxpayer engaged in interstate commerce, the Court heavily qualified the broad Commerce Clause rationale of *Robbins* on which *Hvoslef* relied (303 U.S. at 254, quoting *Postal Telegraph-Cable Co.* v. *City of Richmond*, 249 U.S. 252, 259 (1919)):[10]

> It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their fair share of state tax burden even though it increases the cost of doing the business. "Even interstate business must pay its way" * * *.

[10] See also *General Motors Corporation* v. *Washington*, 377 U.S. 436 (1964); *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100 (1975).

And, in *Canton R.R.* v. *Rogan*, 340 U.S. 511 (1951), the Court indicated a revised view of the proper treatment of taxes upon transactions related or collateral to importation and exportation when it wrote (*id.* at 514-515):

> The difference [between this case and cases such as *Spalding*] is that in the present case the tax is not on the *goods* but on the *handling* of them at the port. * * * [W]hen the tax is on activities connected with the export or import the range of immunity cannot be so wide.

c. Full reconsideration of these issues ultimately came in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), and *Department of Revenue of Washington* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). See also *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984). Those decisions expressly overruled several of the decisions previously discussed and, without cataloging them in detail, rejected other decisions that had disposed of the same issues in the same fashion.

(i) *Michelin Tire* involved the constitutionality of a state property tax as applied to imported tires held in the importer's warehouse in Georgia. Invoking the "original package" doctrine applied in *Low* v. *Austin*, the importer maintained that its imported tires were exempt from state tax. The Court rejected that claim, holding that (423 U.S. at 279):

> Georgia's assessment of a nondiscriminatory ad valorem property tax against the imported tires is not within the constitutional prohibition against laying "any Imposts or Duties on Imports" * * * and * * * insofar as *Low* v. *Austin*, 13 Wall. 29

(1872) is to the contrary, that decision is overruled.

In reaching that decision, the Court reviewed the text and objectives of the Import-Export Clause, as well as its historical origin. 423 U.S. at 283-286. The Court noted that the considerations that gave rise to the Clause were that: (i) the federal government must speak with one voice in regulating commercial relations with foreign governments, and state tariffs on exports and imports could conflict with that requirement; (ii) import revenues were to be the major source of revenue to the federal government and should not be diverted to the States; and (iii) harmony among the States would be disrupted if the seaboard states with good harbors could tax goods passing through their harbors to or from their neighbors. *Id.* at 285.

The Court concluded that nondiscriminatory property taxes would interfere with none of the objectives of the Import-Export Clause. 423 U.S. at 286-290. Noting that the text of the Import-Export Clause—proscribing imposts and duties on imports and exports—did not clearly encompass general property taxes, the Court "decline[d] to presume it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate" (423 U.S. at 293-294). The Court emphasized that (*id.* at 287):

> The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies.

The Court further explained that the "original package" language of *Brown* v. *Maryland* had been misunderstood (423 U.S. at 298):

> [I]t is clear that the Court's view in *Brown* [v. *Maryland*] was that merely because certain actions taken by the importer on his imported goods would so mingle them with the common property within the State as to "lose their distinctive character as imports" and render them subject to the taxing power of the State, did not mean that in the absence of such action, no exaction could be imposed on the goods. Rather, the Court clearly implied that the prohibition would not apply to a state tax that treated imported goods in their original packages no differently from the "common mass of property in the country"; that is, treated it in a manner that did not depend on the foreign origins of the goods.

The Court noted that the opinion in *Low* v. *Austin* had misread Chief Justice Taney's opinion in the *License Cases*, which "makes crystal clear that the prohibition applied only to state exactions upon imports *as imports* and did not apply to nondiscriminatory ad valorem property taxes." 423 U.S. at 300. See pages 18-19, *supra*.

(ii) In *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), the Court held that the Commerce Clause does not bar application of a generally applicable state tax to the gross revenues of a company engaged exclusively in the transportation of motor vehicles in interstate commerce. The Court reconsidered and overruled its decision in *Spector Motor*

Service, Inc. v. *O'Connor*, 340 U.S. 602 (1951), which, following *Robbins*, had held that a State could not impose a generally applicable licensing fee on persons engaged in interstate commerce. See page 22 & note 8, *supra*. The Court noted in *Complete Auto* that it was unquestioned that the activity engaged in was sufficiently connected to the State to justify a tax, that the tax was fairly related to the benefit provided to the taxpayer, that the tax did not discriminate against interstate commerce, and that it was not unfairly apportioned. 430 U.S. at 287. Under those circumstances, the Court concluded that "the *Spector* rule does not address the problems with which the Commerce Clause is concerned" and overruled that decision. *Id.* at 288. The Court's holding in *Complete Auto* necessarily, albeit implicitly, overruled *Robbins* and the "long line of 'drummer cases'" that that decision had spawned. See note 8, *supra*.

(iii) In *Department of Revenue of Washington* v. *Association of Washington Stevedoring Companies*, 435 U.S. 734 (1978), the Court considered the State of Washington's renewed attempt to apply its gross receipts tax to the proceeds from loading and unloading ocean-going vessels. In the earlier decisions in *Puget Sound* and *Joseph v. Carter & Weekes*, the Court had invoked the Commerce Clause to hold unconstitutional the application of state gross receipts taxes to the proceeds of stevedoring cargoes in interstate and foreign commerce. See page 24, *supra*. In *Washington Stevedoring*, however, the Court had little difficulty, after *Complete Auto*, in overruling those decisions insofar as the Commerce Clause was involved. 435 U.S. at 743-751.

The Import-Export Clause required separate consideration. *Michelin Tire* had inquired whether a

generally applicable tax that did not favor or disfavor imports or exports conflicted with any of the policies leading to the adoption of the Import-Export Clause and had upheld the application of the property tax to imported goods, whether or not in the original package, when it found no friction or inconsistency. A similar inquiry led the Court to conclude in *Washington Stevedoring* that the generally applicable Washington tax on gross receipts from stevedoring offended none of the policies of the Import-Export Clause. 435 U.S. at 754-755. The Court specifically rejected the suggestion that the fact that *Michelin Tire* dealt only with goods no longer in transit required that the cases be differentiated. *Id.* at 755-757. The Court explained that *Canton Railroad* demonstrated that the analysis applied in *Michelin Tire* was not to be discarded simply because the goods were in transit. *Ibid.* Moreover, the fact that *Michelin Tire* involved only imports while the tax involved in *Washington Stevedoring* related to proceeds from services for both imports and exports did not call for a different conclusion. *Id.* at 757-758. The Court held that the considerations that led to the decision in *Michelin Tire* were equally applicable to the Washington tax. *Ibid.*[11]

(iv) The Court's decision in *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984), serves as a supplement to these three significant modern decisions. In

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[11] Justice Powell concurred separately in *Washington Stevedoring*. He concluded that the controlling factor in that case, as in *Michelin Tire*, was that local taxpayers should not be required to subsidize the services used and enjoyed by importers and exporters; instead, the consumer of such goods should pay for the services rendered by government just as they paid transportation costs. 435 U.S. at 761-764.

Limbach, the Court made clear that more than a few named decisions had been overruled by *Michelin Tire*, *Complete Auto*, and *Washington Stevedoring*. In overruling an earlier decision that had invalidated the application of a "nondiscriminatory ad valorem personal property tax to imported fibers still in their original packages" (466 U.S. at 354), the Court emphasized that the reasoning that underlay such decisions had been "*repudiated*" (*id.* at 362). The fact that the Court had not explicitly named and cataloged all of the cases whose reasoning had been rejected in its more recent decisions did not mean that those earlier decisions retained "current validity." *Id.* at 361.

7. *Application of The Modern Doctrine to the Export Clause.* The reasoning of the Court in *Michelin Tire* and *Washington Stevedoring* applies equally to nondiscriminatory federal taxes under the Export Clause. Those decisions demonstrate that, when a generally applicable, nondiscriminatory tax is at issue, the mere fact that the tax applies also to goods that are in the export or import process does not provide a constitutional immunity from taxation. See pages 27-29, *supra*. And, as the Court has repeatedly emphasized since *Brown* v. *Maryland*, the Export and Import-Export Clauses are complementary in scope. See pages 16-17, *supra*.[12]

As the court of appeals acknowledged in this case (Pet. App. 4a), and as Madison's *Notes of Debates* and Warren's *The Making of the Constitution* demonstrate, the Export Clause resulted from one of the sectional divisions that marked the Constitutional Convention.[13] In particular, it stemmed from the "concern that a Congress controlled by the more numerous and populous Northern States would impose burdensome levies on Southern exports" (Pet. App. 4a), including the "three great crops which grew nowhere else,—tobacco, rice, and indigo" (note 13,

[12] Most recently, in *Washington Stevedoring*, the Court cited *Spalding* (an Export Clause case) along with cases involving state taxes and the Import-Export Clause to illustrate reasoning that was no longer approved. 435 U.S. at 752.

[13] See Madison's *Notes of Debates in the Federal Convention*, reproduced in 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 305-308, 359-363, 441-442 (1966) (proceedings of August 16, 21, 28, 1787); C. Warren, *The Making of the Constitution* 570-574 (reprint 1993) (1928). The central portion of Warren's description is as follows (at 571-572) (footnote omitted):

> The question of a prohibition of taxes and duties on exports now brought these sectional differences into an outbreak in the Convention.
>
> It is to be noted, as a preliminary to consideration of this clash, that the Committee's proposal to forbid export duties was a very radical departure from the theory and practice theretofore prevailing in government taxation. As has been well said: "To attempt to organize a Government without the power to tax exports was a innovation. From time immemorial, every nation had taxed whatever productions of its soil its inhabitants might presume to export. In the old economy, its maxim was to tax exports but to admit imports free." The prohibition of export duty now inserted in the new Constitution was not based, however, on any change in economic theory but on purely political and sectional conditions. The South, being agricultural and having three great crops which grew nowhere else,—tobacco, rice, and indigo—feared that the possession of this power by Congress could enable the North to discriminate against it, by a tax which would operate only on the peculiarly Southern articles of export. This fear had been expressed early in the Convention.

supra). This narrow historical purpose of the Export Clause is complemented by the narrow language employed in the Clause, which proscibes only federal taxes "laid on Articles exported" (U.S. Const. Art. I, § 9, Cl. 5).

There is obviously no basis for respondent to contend that the generally applicable tax on insurance imposed by Section 4371 of the Internal Revenue Code conflicts with the policies that the Export Clause embodies. This federal tax applies to many forms of insurance that have no relation whatever to exports or the export process (such as life insurance, sickness and accident policies, indemnity bonds and annuity contracts). See 26 U.S.C. 4371(1), (2). Even as applied to casualty insurance, the tax unquestionably has only an incidental and remote relationship to exports and the export process—and it applies equally to wholly domestic commerce as well.[14] That the statute does not discriminate against exports is clear from its text, for it applies to insurance for any risk that arises either "wholly or partly within the United States" (26 U.S.C. 4372(d)(1)). As this Court stated in upholding the constitutionality of the federal tax challenged in *Peck & Co.* v. *Lowe*, 247 U.S. at 175, "There is no discrimination. At most, exportation is affected only indirectly and remotely."

In view of the limited purpose and narrow language of the Export Clause, there is no adequate rationale for sifting through all possible applications of a generally applicable, nondiscriminatory federal tax to

[14] Even within the specific category of casualty insurance, the statute applies to risks that have little or no connection with exports and exportation--such as fire, flood and earthquake.

proscribe its application in remote contexts involving exported goods. Consider, for example, a hypothetical transaction that is not unrelated to the facts of this case. A ship sets out from California with a cargo produced in Arizona. Part of the cargo will be offloaded in British Columbia to a buyer doing business there. The remainder of the cargo will be delivered to a buyer in Alaska. The cargo has been insured by a foreign insurer against damage or loss for its entire journey—beginning with its loading on trucks in Arizona and until delivery at the places of business of the buyers in British Columbia and Alaska. The nondiscrimination policies embodied in the Export Clause plainly do not require that the insurance covering the part of the cargo delivered in British Columbia be made exempt from the federal tax on insurance while the Alaska portion of cargo is not. That would turn the constitutional shield against discrimination in the Export Clause into a sword requiring "preferential treatment" for exports and "that permits escape from uniform taxes" imposed without discrimination (*Michelin Tire Corp.* v. *Wages*, 423 U.S. at 287).

As this Court noted in *Cornell* v. *Coyne*, 192 U.S. at 427, the Export Clause "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated." The United States—like the States—assists and protects respondent's shipments over highways within the United States (financed in substantial part by the federal government) as well as in the movement of such goods by sea or air beyond our borders. As a nondiscriminatory, generally applicable tax designed to raise revenues for the performance of government services, the tax imposed by

Section 4371 is not unconstitutional. Here, as in *Peck & Co.* v. *Lowe*, the tax should be upheld because it is "not laid on" exports or the export process uniquely "or in a discriminative way" (247 U.S. at 174).

It should be emphasized that the Commerce Clause provides Congress with comprehensive authority over exports as well as imports. It was established early that Congress has the power to embargo or otherwise control the export of such goods or materials as the national interest indicates. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 191-192 (1824); *United States* v. *Marigold*, 50 U.S. (9 How.) 560, 566-567 (1850); *United States* v. *The William*, 28 Fed. Cas. 614, 620-623 (D. Mass. 1808) (No. 16,700).[15] It is also clear that Congress may take into account—both in regulating commerce with foreign nations and in laying and collecting taxes—the competitive advantages enjoyed by foreign nationals and foreign corporations. *Board of Trustees* v. *United States*, 289 U.S. 48, 58 (1933). The Export Clause removes only a small and narrowly defined area from the wide-ranging authority provided to the Congress by the Constitution.

Considering the origin, text and narrow objectives of the Export Clause, the role of that Clause within the broader structure of the Constitution, and this Court's recent decisions, the prohibitions of that Clause should be confined to discriminatory taxes

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[15] This authority has recently been exercised in the enactment of the Export Administration Act of 1979, 50 U.S.C. App. 2401-2420. See *Moller-Butcher* v. *United States Department of Commerce*, 12 F.3d 249 (D.C. Cir. 1994); *United States* v. *Bozarov*, 974 F.2d 1037 (9th Cir. 1992), cert. denied, 113 S. Ct. 1273 (1993).

imposed specifically upon "Articles exported." The generally applicable, nondiscriminatory tax on insurance imposed by Section 4371 of the Internal Revenue Code does not violate that standard.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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